VOLUME 60

49996

(60 I.A.2 82)

STANLEY OGRADNEY,	)	
	)	
Petitioner-Appellee,	)	APPEAL FROM THE
	)	
v.	)	CIRCUIT COURT OF
	)	
RICHARD J. DALEY, Mayor, as Local Liquor Control Commissioner, JOHN C. MARCIN, City Clerk, WILLIAM T. PRENDERGAST, City Collector,	)	COOK COUNTY, ILLINOIS
	)	
Respondents-Appellants.	)	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The appellants in this case filed their brief, abstract and record, and have complied with all statutory requirements and rules of this court. No appearance or brief was filed in the appellate court by plaintiff-appellee.

In C.I.T. Corporation v. Blackwell, 281 Ill. App. 504, the court said:

> "In this cause the appellant has fully perfected its appeal and complied with all the requirements of the statute as well as the rules of court. Appellee has filed no brief or argument to sustain the judgment. Where such is the case, under the authority of Eichelberger v. Robinson, 233 Ill. App. 579, decided by this court, the judgment may be reversed, without a consideration of the cause on its merits."

Also see 541 Briar Place Corporation v. Harman, 46 Ill. App. 2d 1, 196 N.E.2d 498.

The judgment is reversed.

Judgment reversed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

UNITED STATES OF AMERICA

(60 I.A.2 221)

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January, in the year of our Lord one thousand nine hundred and sixty-five, within and for the Third District of Illinois:

Present - Honorable Jay J. Alloy, Presiding Justice
Honorable John R. Coryn, Justice
Honorable Allan L. Stouder, Justice
J. Lindo Silver, Clerk
James A. Callahan, Sherrif

BE IT REMEMBERED, that afterwards on JUN 7 1965 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 65-6

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

Abstract

IN THE MATTER OF THE ESTATE OF MARGARET ALICE DAVIS, DECEASED,

MARY MARGARET KASTEN, LORENE ADAMS, VELMA BLANTON, OPAL BURKE, NONA TILLEY and ALICE SEDENTOP,

Objectors-Appellees,

vs.

JOHN WAYNE DUFNER, individually, and as Executor of the Estate of Margaret Alice Davis, Deceased, and SAMUEL SAXON,

Petitioners-Appellants,

NONA TILLEY, MARY MARGARET KASTEN, LORENE ADAMS and VELMA BLANTON,

Objectors-Cross Appellants.

vs.

JOHN WAYNE DUFNER, individually and as Executor of the Estate of Margaret Alice Davis, Deceased, and SAMUEL SAXON,

Petitioners-Cross Appellees.

Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County.

CORYN, J.

Margaret Alice Davis, 83 years of age and a resident of Peoria, Illinois, died testate on April 18, 1961. On May 31, 1961, her will was admitted to probate in Peoria County, and John Wayne Dufner, a nephew, was appointed executor of her estate. This will provided, among other things, for a $7,500 legacy to each of six nieces, Mary Margaret Kasten, Lorene Adams, Velma Blanton, Opal Burke, NonaTilly, and Alice Sedentop; for an $8,000 legacy to Vance J. Casali, a friend; for a $5,000 legacy to John Wayne

Dufner, nephew; for a devise of a 320 acre farm near Clarion, Iowa, to John Wayne Dufner and William B. Dufner, nephews; and that the residue of the estate be divided equally among said six nieces and two nephews. Mr. Dominic F. Boetto, an attorney from Joliet, was retained by the Executor to handle the estate.

In June of 1961 the six nieces of the decedent filed a suit in Peoria County, Illinois, to contest this will. Thereafter, the executor retained Attorney Samuel Saxon of Plainfield, Illinois, and Attorney Bernard J. Ghiglieri, Jr. of Peoria, Illinois, to defend this will contest suit.

In an ancillary proceeding in Wright County, Iowa, John Wayne Dufner was also appointed executor of the will of Margaret Alice Davis, decedent. On May 31, 1962, the six nieces of the decedent filed a suit in the District Court of Wright County, Iowa, to set aside said will. On July 17, 1962, John Wayne Dufner, as executor, petitioned the Probate Court of Peoria County for leave to retain Attorney Allen Loth of Ft. Dodge, Iowa, to defend the will contest in Wright County, Iowa. An order was entered by the Peoria Probate Court giving the executor leave to employ Attorney Loth and to pay him a retainer fee of $250.

On May 14, 1963, the six nieces contesting the Last Will and Testament of Margaret Alice Davis, deceased, dismissed their will contest suit in Peoria County, Illinois. On December 26, 1963, the will contest suit in Wright County, Iowa, was settled for $18,000.

On July 13, 1964, John Wayne Dufner, as executor of said estate, petitioned the Circuit Court of Peoria County for leave to pay to Attorney Samuel Saxon the sum of $11,425.55 for attorney's fees; to Attorney Bernard J. Ghiglieri, Jr. the sum of $6,157.64 for his fees; and to Attorney Allen Loth the sum of $2,242.84 for his fees, all said fees being incurred in defending the will contests in Iowa and Illinois. A hearing was had on this petition before the Circuit Court of Peoria County, and on October 2, 1964, the court awarded as fees and expenses to Attorney Saxon the sum of $4,692.50

and to Attorney Ghiglieri as fees and expenses the sum of $4,615.14. No award was made to Attorney Loth.

It is from the foregoing order awarding fees that the executor, John Wayne Dufner, appeals, claiming (1) that the court was in error in disallowing fees for the Iowa will contest, (2) that the expenses of the Iowa will contest should be allowed against the domiciliary estate in Illinois where personal property in the ancillary estate in Iowa is insufficient, and (3) that the fees allowed Attorney Saxon are insufficient, unreasonable, and constitute an abuse of discretion. Although not a party to the petition in the Circuit Court, Attorney Saxon attempts to join in this appeal with the executor, also claiming that the fees are unreasonable and an abuse of discretion.

The six nieces of the decedent filed a cross-appeal from this order claiming that the fees awarded Attorney Saxon were excessive, and that no fees should be awarded from the estate for the defense of the will contest, as the defense of the will contest was solely for the benefit of the executor and his brother, and did not benefit the other heirs at law of decedent.

During the lengthy hearing Attorney Saxon testified that he spent 236 3/4 hours of time in defending the Illinois will contest suit, and an additional 68 1/4 hours in assisting with the defense of the Iowa will contest. Attorney Ghiglieri testified that he spent 188 3/4 hours of his time in defense of the Illinois will contest suit. Attorney Loth made a claim of $2,242.84 for the time he spent in the defense of the Iowa will contest.

The Circuit Court, in the order appealed from of October 2, 1964, specifically disallowed any fees for services in connection with the Iowa will contest. The court then applied the Illinois State Bar Association schedule of Recommended Fees of $25 per hour for "routine office work," $12.50 to $15 for one-half hour of office work, $5 for a telephone call or letter where no research was required, $125 per day plus travel expenses where the day was spent away from the attorney's office, and $100 per day for court appear-

ances. In applying this fee schedule to the claims of the respective attorneys, the court concluded that Mr. Saxon was entitled to $3,104 for office work and court appearances, an additional $1,500 for the responsibility of defending the will contest, his experience, and the outcome of the contest, plus expenses of $88.50, for a total of $4,692.50. The court made an award to Attorney Ghiglieri for $3,895 for court appearances and office preparation, plus $500 for the responsibility of defending the will contest, and $220.14 for costs, for a total of $4,615.14. The court made no award to Attorney Loth.

The record indicates that the decedent's estate in Illinois included personal assets of $99,564.09, real estate of $11,925.00, and expenses of $49,420.73, or a net Illinois estate of $62,068.36. The Iowa estate consisted of real estate of $130,000.00 and personal property of $4,000.00. There is no indication in the record of the expenses of administration or claims against the estate in Iowa.

"It is the duty of the executor or the administrator with will annexed to defend a proceeding to contest the validity of the will...." Ch. 3, § 93, Ill. Rev. Stat. (1963). However, the executor has no right to involve the estate in unnecessary litigation or expense. In re Estate of James, 10 Ill. App. 2d 232, 242. Also, domiciliary probate proceedings and ancillary probate proceedings are separate and distinct, and the personal property in the ancillary estate is the primary fund out of which the expenses incurred in the ancillary proceedings shall be paid. When the benefit of the ancillary proceedings enures solely to a specific group of devisees or legatees, then the costs of the ancillary proceedings are not chargeable to the domiciliary estate. James, Ill. Probate Law & Practice, ch. 114, § 289.3.

In the instant case the Circuit Court was correct in refusing to charge fees against the Illinois estate for defense of the will contest suit in Iowa as the personal estate in Iowa was the primary fund out of which fees for the defense of the Iowa will contest should be made. There was no showing here that the personal estate in Iowa is exhausted, or even that a petition was filed by the executor in the District Court of Wright County, Iowa, for

fees for Attorneys Saxon and Loth for whatever time they expended in the defense and settlement of the Iowa suit.

"The attorney for an executor, administrator, administrator to collect, guardian, or conservator shall be allowed reasonable compensation for his services." Ch. 3, § 337, Ill. Rev. Stat. (1963). The issue of what constitutes "reasonable compensation" has often come before Illinois courts of review. In In re Estate of Jaysas, 33 Ill. App. 2d 287, at 292, it was stated:

"The amount to be paid to an attorney for services rendered by him for an administrator or executor is a matter peculiarly within the province of the [Circuit] Court.... This amount is to be determined by the court in the exercise of judicial discretion. Each case must rest upon its own facts and circumstances, and no hard and fast rule has been or can be laid down in determining what would be a reasonable attorney fee in each case.... The factors to be considered include the size of the estate, the work done and the skill with which it was performed, the time required, and the advantages gained or sought by the services or litigation. Good faith, diligence and reasonable prudence should be included, so as to prevent, on the one hand, excessive charges, and on the other hand, inadequate allowances. No general rule can be laid down as to what particular amount may be held to be reasonable, inadequate or excessive....

"The [Circuit] Court has the requisite skill and knowledge to determine what is fair and reasonable compensation for an attorney. While the number of hours asserted to have been expended in labor for an estate is an important factor, experience in such matters makes it possible for a [Circuit] Judge to make a reasonable approximation of the amount of time which various steps in estate settlement should properly consume. In the exercise of its judicial discretion, the court is not to be wholly controlled by the opinions of attorneys as to the value of services. It should, to a great extent, exercise an independent judgment in determining attorney's fees to be paid out of a decedent's estate.... In order to alter a fee allowance

made by a trial court, a reviewing court is required to find that the determination of the trial court is manifestly or palpably erroneous. It requires a plain case of wrongful exercise of judgment to permit a reviewing court to alter the allowance...."

Here the executor and Attorney Saxon, appellants, claim that the fees awarded are inadequate, while the decedent's nieces, appellees, and cross-appellants claim that the fees allowed are excessive. A review of the evidence, and the findings and judgment of the trial court, definitely establish that a careful study was given by the trial court to the issue of fair and reasonable fees, and that a conscientious effort was made to apply fee schedules that were customary in Peoria County. We cannot say that the trial court abused its discretion in fixing the amount of the fees, and we, therefore, will not disturb the order fixing these fees by substituting our judgment for that of the trial court.

The order of the Circuit Court of Peoria County fixing said fees is affirmed.

Affirmed.

Alloy, P. J. and Stouder, J. concur.

No. 65 - 5M

June 7

60 I.A.2d 222

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

A

Abstract

M. BRIAN STOKES, Plaintiff-Appellee, vs. ARNOLD V. KERSHAW, Defendant-Appellant.	Appeal from the Magistrate Division of the Circuit Court, Henry County, Illinois.

CORYN, J.

On June 17, 1964, the plaintiff, M. Brian Stokes, filed a suit against the defendant, Arnold V. Kershaw, in the Circuit Court of Henry County, at the office of the Circuit Clerk at Cambridge, Illinois, for damages to the plaintiff's automobile in the sum of $350. This case was assigned to Magistrate Paul S. Yackley at Geneseo, Illinois, pursuant to Circuit Court rules. On the same date summons was issued from the office of the Circuit Clerk of Henry County to the Sheriff of Henry County, which summons was served on the defendant June 19, 1964. This summons stated that, "You are summoned and required to appear before this court at 517 South Congress Street at 11:00 o'clock a. m. on July 7, 1964, to answer the complaint in this case, a copy of which is attached hereto. If you fail to do so, a judgment by default may be taken against you for the relief asked in the complaint." At 11:00 a. m. on July 7, 1964, the plaintiff and his attorney appeared in the court of Magistrate Yackley in the City of Geneseo. The defendant failed to appear, or in any way file an entry of appearance, and at 12:00 o'clock noon

on this date, default judgment was entered against the defendant in the sum of $350 plus costs. On July 11, 1964, the defendant filed a motion to set aside this default judgment and for leave to plead. This motion contained the affidavit of the defendant's attorney, which stated that the defendant had a meritorious defense to the plaintiff's cause of action, that the defendant's attorneys had been engaged to handle the defense of this case on or about July 1, 1964, by the defendant's insurance carrier, and that on the date of the default they had not yet received the file from the insurance carrier. The affidavit also stated that the defendant's attorneys had been continuously engaged in the trial of jury cases in the Circuit Court of Henry County during the months of May and June, and that they had been diligent in handling this case. The affidavit further states that the defendant's attorneys, on July 7, 1964, called the plaintiff's attorney and were at this time informed that a default judgment had been taken at noon of the same date. The plaintiff filed no affidavits or written objections to the defendant's verified motion to set aside the default judgment. On September 11, 1964, Magistrate Yackley denied the motion to set aside the default judgment, and from this ruling that the defendant appeals.

The defendants contend that the default judgment against them was void because the summons failed to state the city in which Magistrate Yackley's court is located, and that Magistrate Yackley erred in not granting the defendant's motion to set aside the default judgment.

The record discloses that the summons was in proper form, except that it listed the street address of the Court where appearance was required, but failed to state in what city in Henry County the address related to, or the name of the Magistrate to whom the case had been assigned. The defendant did not object to this omission in the trial court, but instead, filed a motion to set aside the default judgment and for leave to plead, which motion made no mention of the defect in the summons. Generally, objections based on

defects in the process, or service thereof, or the proof or return thereof, cannot be raised for the first time on appeal unless it is essential or necessary to jurisdiction and is such a defect that renders the process absolutely void and not amendable. In order to preserve such questions on appeal, specific objections must be made in the lower court. 2 I. L. P., Appeal and Error, § 241. If the defendant wanted to contest the jurisdiction of the court because of the error in the summons, he should have entered a limited appearance and called this defect to the attention of the court. The defendant did not do this, but instead filed his motion to vacate or set aside the default judgment, and also sought leave to file an answer and counterclaim. He thereby submitted himself to the jurisdiction of the court and waived his objections to the defective summons. Kunde v. Prentice, 329 Ill. 83, at 88, and United States Brewing Co. v. Epp, 247 Ill. App. 315. "[A] person cannot, by his voluntary action, invite the court to exercise its jurisdiction and at the same time deny that jurisdiction exists." Lord v. Hubert, 12 Ill. 2d 83, 87.

The provisions of the Civil Practice Act apply to all civil proceedings in magistrate courts since January 1, 1964. Ch. 110, § 101. 23, Ill. Rev. Stat. (1963). Ch. 110, § 50(6) states as follows:

> "The court may in its discretion, before final order, judgment or decree, set aside any default, and may on motion filed within 30 days after entry thereof, set aside any final order, judgment or decree, upon any terms and conditions which shall be reasonable."

It has been the practice in Illinois for courts to be liberal in setting aside default judgments if the proper motion is made within 30 days after said judgment was entered, and where it appears that justice will be promoted thereby. Davies v. Davies, 6 Ill. App. 2d 8. "A motion to set aside the judgment and vacate an order of default is addressed to the sound legal discretion of the court in which it is made and unless there has been a palpable abuse of such discretion, an Appellate Court should not interfere. If, however, the action of the court to which the application is made is unjust and oppressive and has

resulted in a substantial injury to appellant, such action will be reversed on review. Such motion or application should show a meritorious defense and a reasonable excuse for not having made that defense in due time." Busser v. Noble, 8 Ill. App. 2d 268, at 274. The defendant's verified motion to set aside the default judgment tends to show that the defendant has a meritorious defense to the cause of action resulting from an automobile accident, and also that the defendant has a counterclaim against the defendant, which counterclaim results from the same accident. The verified motion further states that the defendant's attorney contacted plaintiff's attorney on the afternoon of the day on which the default judgment was entered, and at that time informed the plaintiff's attorney that the defendant's attorneys did not have in their possession the file of the case from the insurance carrier. The plaintiff did not controvert any of the matters stated in the defendant's verified motion to set aside the default judgment, and consequently, these matters must be taken as true.

Regarding the question of diligence, the record clearly shows that the defendant's attorneys contacted the plaintiff's attorney on the very day on which the default judgment was entered, and within four days thereafter, filed the motion to set aside the default judgment. Considering these matters, together with the fact that the motion was filed within 30 days from the date of judgment, and that the aforesaid defects in the summons may have caused confusion and delay to the defendant, we believe that justice requires that the default judgment be set aside and vacated, and that the defendant be given an opportunity to answer, and that the case be tried on its merits. Consequently, the order of the Magistrate denying the motion to vacate the default judgment is hereby reversed, and the case is remanded to the Magistrate's Court for such further proceedings as the parties are entitled to under the law.

Reversed.

Alloy, P. J. and Stouder, J. concur.

49399

BURGE ICE MACHINE COMPANY, an Illinois corporation, Plaintiff-Appellant, v. LEONARD C. DICKERSON and HOMER H. EDWARDS, a partnership, d/b/a SPRINGFIELD ICE SKATING CLUB, Defendants-Appellees.	)	60 I.A.2d 266 APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered against plaintiff.

In September of 1961, plaintiff, Burge Ice Machine Company (hereinafter referred to as Burge) entered into a contract with defendants, Leonard C. Dickerson and Homer H. Edwards, a partnership d/b/a Springfield Ice Skating Club, Springfield, Pennsylvania (hereinafter referred to as Springfield), for the sale of one Heinzelman 70' x 150' Pavilion type Uniflow patented ice skating rink with related refrigeration machinery. The contract provided in part as follows:

> "2. WARRANTY. Any part or parts of the equipment found to be defective within one year from the date of delivery will be replaced, or at Seller's option, repaired free of charge, natural wear, tear, neglect, misuse and accident excepted. Unauthorized alterations of this equipment void this warranty. No warranty is made by the Seller except as herein set forth.
>
> "The Seller shall not be liable for any loss or damage that may be caused or result from the operation or failure of the equipment sold hereunder, and the Buyer hereby acknowledges that no agreement to service and maintain said property has been made by the Seller."

Two units were installed in December of 1961 in the engine and furnace room of defendants. The water connection ends of the condensers on each unit were placed close to an overhead garage door. Eight feet from unit No. 1 was a service door. The thermostat, controlling the heat in the building, was located at the other end of the building, about 70' away, in an office beyond a warming room, snack bar, skate rental room, skate changing room, skate sharpening room and bathrooms. At that time there was no interior door between the engine room and furnace room and

that portion of the building in which the thermostat was located.

On the night of January 14, 1962, Mr. Edwards of Springfield noticed the ice was slushy, and that the No. 1 compressor was off. The electrician employed by Springfield determined that there was no electrical problem involved so Edwards telephoned Mr. Hagen, president of Burge, for assistance. From Edwards' description of the condition of the machine, Hagen could not diagnose the difficulty with absolute certainty, and Hagen suggested that a refrigeration man look at the machine and describe its condition from a more technical point of view. Edwards suggested a Mr. Green of Climatic Corporation. Green was called and after examining the machine, telephoned Hagen. Hagen determined that there was water in the refrigerant circuit of unit No. 1 and told Green to "valve the thing off and we would try to send another condenser down there as fast as possible." Hagen immediately called Bell and Gossett and made arrangements to have a replacement condenser shipped to Springfield as rapidly as possible.

Mr. Heckman, a serviceman from Burge, was sent to Springfield and arrived there on January 19, 1962. He worked a total of 170 hours replacing the damaged condenser and cleaning the system so that it could be put back in operation. The damaged condenser was examined and was found to contain a number of split water tubes in the lower portion of the condenser. It was the unanimous opinion of all parties that the splits had been caused by the freezing of water within the tubes. In the course of replacing the condenser and rehabilitating the machine, Heckman dismantled the compressor. The compressor had quite a bit of water in it which he removed. He cleaned the compressor, put it back together and oiled it up. After replacing the condenser Heckman tested the machine and found it to be in good operating condition.

On the morning of March 4, 1962, Edwards arrived at the club and found the No. 1 compressor shut down. He recognized the symptoms

and called Hagen immediately. Hagen sent Heckman to Springfield the same day. There was already a replacement condenser on the premises at Springfield. Beckman worked from March 5 through March 8, 1962 replacing the condenser and cleaning the system, a total of 46 hours. The damage to the condenser was again a frozen tube. After it was repaired, the machine operated properly.

Burge demanded payment for the materials supplied and services rendered, and was refused by Springfield. The services and materials furnished by Burge were the replacement of a refrigerant condenser on unit No. 1 of the refrigeration equipment on the two aforesaid occasions. Suit was brought by Burge in the Municipal Court of Chicago seeking recovery of $4,394.73. It also sought recovery of $200.85 on an account receivable, assigned to Burge by a company affiliated with Burge, which had sold equipment to Springfield. Springfield filed an answer and counterclaim, both charging breach of the warranty contained in the aforesaid contract, asking $6,062.01 on the counterclaim as damages resulting from the aforesaid breach of warranty. The case was tried without a jury. There was no controversy at the trial as to the performance of the repairs by Burge, the value thereof or the $200.85 owed on account of equipment sold. There was controversy as to whether the cause of the damage which necessitated the repairs was such as would be covered by the warranty. There was no controversy regarding the fact that the rupture of the tubes was caused by freezing of the water. The cause of the freezing, however, was controverted.

Springfield contended that the freezing was caused by a malfunction of the machine through release of pressure upon the refrigerant gas in the condenser, which resulted in leakage of the refrigerant gas through the valves of the compressor, transformation of the refrigerant gas into a liquid and a refrigerative effect on the liquid refrigerant in the condenser. Burge contended that it was impossible for the

damage to have occurred in accordance with the theory advanced by Springfield, especially in view of the good condition of all the valves in the compressor, but suggested that a door to the furnace room had been left open and that the temperature had fallen well below 32 degrees causing the water in the condenser to freeze, rupturing the tubes.

At the time of trial Heckman was no longer an employee of Burge, but testified that after the malfunction he had examined the compressor valves and found them to be in good condition. Hagen testified for plaintiff that the total charge for the work performed by Heckman and the parts furnished was $4,595.58. Plaintiff also introduced official reports of the United States Weather Bureau which showed a low temperature at Philadelphia International Airport on January 14, 1962 of 13 degrees and on March 4, 1962 of 11 degrees. Philadelphia International Airport is about ten miles from Springfield Ice Skating Club. This evidence was introduced to substantiate plaintiff's theory that a door had been left open.

Edwards testified on behalf of Springfield that when he went into the compressor room on both January 15 and March 4, 1962, the doors were closed, and that when they are closed they are locked and that the service door is always locked. He also testified that after the second malfunction an expansion valve was replaced and a drain installed and no further trouble developed. Green testified on behalf of Springfield that in his opinion the damage to the condenser had been caused by a malfunction of the machine. Green's theory was that a release of pressure upon the liquid refrigerant in the condenser, by virtue of a leakage of refrigerant gas through the valves of the compressor, resulted in a refrigerative effect in the condenser, freezing the water in the tubes. Green concluded that the compressor valves had to be faulty. On cross-examination Green testified that he did not at any time examine the valves in the compressor, and that he did not know their condition.

Frank Raufesin of Bell and Gossett, on examination by the court, testified that other than by subjection to an ambient temperature well below 32 degrees, the freezing of the tubes in the condenser could not occur except by a violent expansion of the refrigerant in the condenser. He stated ... "there is a rate of expansion, in my opinion involved, a time element. ...of all valves were broken, all valves, I am including expansion and discharge valves in the compressor, if all valves were broken a condition like that could occur." In response to a question of whether or not the condition could otherwise happen, Raufesin stated, "that it could not."

The trial court found in favor of Burge on the $200.85 account, against Burge on its claim for materials and services rendered in the repair of the equipment and against Springfield on their counterclaim charging breach of warranty and gave judgment accordingly. The court found that neither party had proved by a preponderance of the evidence that their theory regarding the cause of the damage was correct. Burge presented a post-trial motion for a ruling in its favor on the amount claimed for repairs. That motion was denied, and this appeal ensued.

First, we must examine the contention of plaintiff that it established a prima facie case for materials furnished and services performed and its further contention that defendants offered no evidence to the contrary. After examination of the record we must agree with plaintiff. Defendants' sole defense was an alleged breach of warranty. Springfield relying on the express warranty in the contract as an affirmative defense sought to prove that the machinery was faulty and relieve them of their obligation to pay the amount due plaintiff. Defendants did not refute the prima facie case of the plaintiff.

Thus we must inquire whether or not defendants negated plaintiff's prima facie case by their claim of breach of warranty. In response to this issue, plaintiff claims that: one, the burden of proving a breach of warranty is on the person alleging such a breach;

and two, that defendants failed to sustain that burden. The law is well settled that the party alleging a breach of warranty has the burden of proving both the warranty and its breach. Milk v. Moore, 39 Ill. 584 (1864). Mayflower Sales Company v. Frazier, 325 Ill. App. 314, 60 N.E.2d 123 (1945). Thus defendants had the burden of proof. They also had the burden of going forward with enough evidence to establish a prima facie case. They proved that a warranty existed by offering the contract into evidence and then offered proof of its breach. Mr. Green testified that a vacuum test had been taken. It was his opinion that the result of this test showed that the compressor valves in the compressor unit were faulty. This was sufficient to establish a prima facie case of breach of warranty. The burden of going forward with evidence then shifted to plaintiff. The burden of proof, however, did not shift but remained with defendants. Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961).

Plaintiff now had to introduce enough evidence to reach a state of equipoise, but did not, as the trial judge inferred, have to disprove the breach of warranty by a preponderance of the evidence. Plaintiff offered testimony that in order for any leakage to occur all the compressor valves had to be broken and that the compressor valves were inspected and found to be in working condition. Plaintiff also presented a theory that the door to the room in which the machinery was located was left open and caused the freeze in the compressor valves. After hearing this evidence the trial court found that plaintiff had not proved their theory that the door had been left open. That finding was immaterial. Defendants and not plaintiff had the burden of proving the breach of warranty both on its affirmative defense and on its counterclaim. The finding that a door had not been left open would in no way prove defendants' case. Defendants had to prove the breach of warranty by a preponderance of the evidence.

Plaintiff contends that this error by the trial court was prejudicial. Plaintiff reasons that the trial court based its decision on an improper conclusion of law and that the decision would have been in favor of the plaintiff, but for this error. An erroneous conclusion of law which is prejudicial to a party, constitutes grounds for reversal. MaGirl v. Hastings, 120 Ill. App. 276 (1905). Error in a conclusion of law, however, is not grounds for reversal where the judgment is correct and proper. Commercial State Bank of Foreston v. Folerts, 200 Ill. App. 385 (1916). Thus, if the judgment was proper, there is no prejudice to the party appealing, and where an alleged error in the conduct of a trial or hearing has not prejudiced the party complaining, it is harmless and not grounds for reversal. McGraw v. Gavin, 27 Ill. App.2d 62, 169 N.E.2d 171 (1960). Furthermore, an erroneous ruling as to the burden of proof will not be reversed if a party has not been prejudiced. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906), Blanchard v. Blanchard, 191 Ill. 450, 61 N.E. 481 (1901). We must examine the evidence and see if the judgment was correct and thus free of prejudicial error.

There is no indication, after reviewing the record, that two essential questions were answered by the trial court; therefore they must be answered by us. The first is whether or not plaintiff presented enough evidence in opposition to defendants' prima facie case of breach of warranty, to place the case in equipoise. If it did not, then defendants proved their case by a preponderance of the evidence and if it did then the burden of producing evidence shifted to defendants to introduce more evidence and establish its burden of proof. We find that plaintiff did offer enough evidence to place the case in equipoise. It was brought out on cross-examination, by plaintiff, that Green had not examined or even seen the compressor valves which he contended were faulty. Plaintiff then offered the testimony of Heckman that he dismantled the machinery, cleaned the compressor valves

and found them to be in proper condition. We find that this evidence by plaintiff's witness together with the testimony of defendants' witness on cross-examination that he had never seen the alleged faulty valves, was enough to place the case in equipoise, as an inference could be drawn from this evidence that the valves were not faulty.

A more difficult question to answer is whether or not defendants proved its breach of warranty by a preponderance of the evidence. At the outset, plaintiff contends that the unappealed finding of the trial court against defendants on their counterclaim makes the issue of breach of warranty res judicata. This contention is invalid as a party cannot raise the defense of res judicata or collateral estoppel for the first time on appeal. Simon v. Nitzbay, 327 Ill. App. 533, 64 N.E.2d 396 (1946), Lenhart v. Mitchell, 375 Ill. 346, 31 N.E.2d 781 (1941).

Thus, proceeding to the question of the breach of warranty, both sides presented theories to the court as to how the freeze in the compressor tubes took place. Plaintiff theorizes that the freeze must have been caused by the temperature in the room (which we call the ambient temperature) dropping to a point substantially below freezing and this was caused by defendants leaving a door or doors open. Defendants' theory is that there was refrigerating liquid called freon, in the bottom of the condensor in unit No. 1 and when the unit was shut down during a non-operating period because of lack of demand, the freon gas leaked through the compressor valves, from the high pressure side to the low pressure side which caused a reduction in pressure above the liquid refrigerant, thus allowing it to evaporate, and that this in turn caused a refrigerative effect in the bottom of the unit. An examination of the record shows that defendants offered the following proof in support of this theory. Green testified that a vacuum test was taken on the compressor unit and that it showed a reduction of vacuum in the machinery from 25 inches to 8 inches. Green testified

that this reduction could mean only one thing - that there was slippage or leakage of the refrigerant from the high pressure side to the low pressure side of unit No. 1.

Plaintiff offered, in opposition to defendant s' theory, the testimony of Raufesin of Bell and Gossett, who stated that other than by subjection to an ambient temperature well below 32 degrees, the freezing of the tubes in the condenser could not occur except by a violent expansion of the refrigerant in the condenser. Heckman had already testified for plaintiff, that he had examined the compressor valves and found them to be free of any defects. Plaintiff offered no evidence in support of its theory that the doors were left open and that outside air froze the tubes. Defendants offered no evidence contrary to plaintiff's prima facie case but did offer the following evidence in opposition to plaintiff's theory. Green and Edwards testified that an unprotected thin walled copper tube which contained water and which ran from a point inside the door of the furnace room was not frozen in any way. Green also testified that unit No. 2 did not freeze and that this unit was closest to the cold outside wall of the furnace room. There was testimony that the equipment was in the same room as the furnace, which at all times was kept at a temperature of approximately 60° to 70° fahrenheit and that a register was approximately 15' from the equipment. There was also testimony that the doors were locked every night. Plaintiff rebutted this testimony by offering United States Weather Bureau reports showing the outside temperature on the day the freeze was discovered as approximately 11° above zero on January 24, and approximately 4° on March 4, 1962. Defendants explained that these temperatures were not relevant as the freeze occurred prior to these dates.

A careful examination of the record leads us to the conclusion that the judgment of the trial court was proper despite its erroneous conclusion of law. There was sufficient evidence to support the

affirmative defense of defendants. It is true that plaintiff did not have to prove the doors were left open and that defendants had to prove that the machinery contained faulty parts. We hold, however, that defendants met this burden. The testimony of Green describing how the refrigerant leaked through the compressor valves resulted in an inference that the valves were faulty. This testimony was not weakened by the fact that Green never saw the valves. It is true that Heckman testified he examined the valves and found them to be in working condition and that an inference might be drawn that the valves were not defective. It could also be said, however, that the valves became workable after they were taken apart, cleaned and put together again and that any foreign substance causing a valve to malfunction would be removed by Heckman's action in cleaning the valves. It is also true that Raufesin testified that leakage could not occur unless all of the expansion and discharge valves in the compressor were broken. An examination of the system reveals, however, that a breakdown in less than all of the valves could bring about a reduction in pressure and there was uncontradicted evidence introduced by defendants that an expansion valve was found to be defective.

Our conclusion that defendants met the necessary burden of proof on its affirmative defense is not weakened by the ruling of the trial court against defendants on their counterclaim. We hold the trial court was in error to find against defendants on the counterclaim. If we were able to consider the counterclaim on this appeal for the purpose of entering judgment, we could only conclude that the finding of the lower court was against the manifest weight of the evidence.

Defendants, however, contend that this court should consider its unappealed counterclaim, for the purpose of entering judgment in its favor on the counterclaim, because their claim is tightly interwoven with plaintiff's case. Plaintiff contends that consideration of a

counterclaim for the purpose of entering judgment on the counterclaim is forbidden on appeal, unless there is compliance with Section 101.35 (1) of the Civil Practice Act. We have to agree with plaintiff. Section 101.35 (1) of the Civil Practice Act, Ill. Rev. Stat. 1963, Chap. 110, par. 101.35 states as follows:

> "Each appellee who desires to prosecute a cross appeal from all or any party of the judgment, decision, order or decree, and each co-party who did not join in the notice of appeal but who desires to join as appellant or to prosecute a separate appeal shall, within 10 days after service upon him of notice of appeal, serve a notice upon each party or attorney or firm of attorneys who signed the notice of appeal, and upon each appellee, person or officer entitled to receive notice of an appeal, and file a copy thereof in the trial court."

Defendants did not file a notice of cross appeal from the judgment against them on their counterclaim. They are not in a position to ask for reversal of that judgment in this court. Pruitt v. Motor Cargo, Inc., 30 Ill. App.2d 222, 173 N.E.2d 851 (1961). The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

A

49984

(60 I.A.2 278)

CITY OF HOMETOWN, a municipal corporation,	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
AIRWAY MOTOR COURT, INC.; STANDARD STATE BANK, as Trustee u/t/a/ dated Dec. 19, 1955, and known as Trust No. 1402; and VILLAGE OF OAK LAWN, a municipal corporation,	)	COOK COUNTY.
Defendants-Appellees.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Hometown from a decree entered in a declaratory judgment proceeding brought by the City of Hometown against Airway Motor Court, Inc., Standard State Bank, as Trustee under Trust No. 1402, and the Village of Oak Lawn. In substance, the complaint charged that the bank had filed a document in the Recorder's Office of Cook County, Illinois, claiming ownership of certain streets in the City of Hometown as well as various streets in the Village of Oak Lawn, and that a controversy existed as to the plaintiff's right to enforce its parking ordinances on the north half of 90th Street and the east half of Kilpatrick Avenue, and asked the court to find said document to be of no legal effect and that plaintiff had jurisdiction over said streets.

The court entered a decree finding that the streets involved were public streets and had not been abandoned by the public and granted the relief prayed, except that the court added a provision which found and decreed that the Village of Oak Lawn, and not the plaintiff, was entitled to and had jurisdiction over 90th Street from the center line of Cicero Avenue

to the eastern line of Kilpatrick Avenue, and of Kilpatrick Avenue from 90th Street to the center line of 91st Street.

The Village of Oak Lawn admitted the allegations in plaintiff's complaint and joined in the prayer that the document filed by the bank be held to be of no legal effect with regard to those parts of the streets located within the respective corporate limits of the two municipalities. Airway Motor Court, Inc. was defaulted, and neither the bank nor the Village of Oak Lawn has filed briefs in opposition to the plaintiff's request.

It is apparent that the suit was instituted for the sole purpose of determining the claim of the bank to ownership of the area described in the complaint. The jurisdiction of the City of Hometown over the portions of the streets in question was unchallenged.

The decree must be reversed and the cause remanded with directions to strike from the decree the erroneous portions hereinbefore mentioned and to substitute therefor the following:

> "IT IS ORDERED, ADJUDGED AND DECREED that the City of Hometown, a municipal corporation, has jurisdiction over the north half of 90th Street from the center line of Cicero Avenue to the east line of Kilpatrick Avenue and the east half of Kilpatrick Avenue from the center line of 90th Street to the center line of 91st Street, and has all the rights provided in the Illinois Municipal Code in the jurisdiction over said streets.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Village of Oak Lawn, a municipal corporation, has jurisdiction over the south half of 90th Street from the center line of Cicero Avenue to the center line of Kilpatrick Avenue and the west half of Kilpatrick Avenue from the center line of 90th Street to the center line of 91st Street and all of Keating Avenue from the center line of 90th Street to the center line of 91st Street, and has all the rights provided in the Illinois Municipal Code in its jurisdiction over said streets."

Decree reversed and cause remanded with directions.

Dempsey, P.J., and Sullivan, J., concur.

Abstract only.

49884

(60 I.A.2307)

MARILYN L. KONRAD,	)	
	)	APPEAL FROM CIRCUIT
Plaintiff-Appellee,	)	
	)	
v.	)	COURT OF COOK COUNTY
	)	
RONALD F. KONRAD,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from an order entered in the Circuit Court of Cook County, Illinois, requiring the appellant, Ronald F. Konrad, to pay $150.00 in attorney's fees to Stanford J. Green. Mr. Green represented Konrad's wife, Marilyn, in her divorce action against the appellant. During the course of the divorce action, the husband and wife became reconciled and went before the Court below to ask a dismissal of the action. At that time the Court was informed that Mr. Green no longer represented Mrs. Konrad. The Court at first refused to dismiss the action on the objection of Mr. Green who claimed that he had fees due him for the legal services he had rendered Mrs. Konrad. The Court finally entered an order dismissing the cause of action, but also entered an order requiring the husband to pay $150.00 to Mr. Green.

The appellant's theory of the case is that the wife had an absolute right to dismiss her cause and to discharge her attorney and that the Court lacked jurisdiction to enter the order requiring the husband to pay attorney's fees for past services.

The actual appellee and party in interest, Stanford J. Green, filed a motion before this Court and on October 9, 1964, we ordered that in this appeal he be allowed to file his memorandum which he presented before the Court below in lieu of a formal brief. The order gave Mr. Green 40 days within which to file this memorandum. In the more than five months that have passed, nothing had been filed in this appeal on his behalf. As is our custom in such cases, we will not go

into any detail as to the merits of the case. We are of the opinion that the judgment of the Court below should be reversed.

The appellant has cited the case of Watson v. Watson, 335 Ill. App. 637, 82 N.E.2d 671 (1948). That case held that when a wife abandoned her suit for divorce, the Court lost jurisdiction over the matter and could not order the payment of attorney's fees. On the basis of the Watson case, we hold that the order of the Court below must be reversed.

ORDER REVERSED AND CAUSE REMANDED FOR PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

BURKE, P.J., and LYONS, J., concur.

49794

PEOPLE OF THE STATE OF ILLINOIS,	)	(60 I.A.2307)
Plaintiff-Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
CHARLES MASON,	)	CRIMINAL DIVISION
Defendant-Appellant.	)	COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of involuntary manslaughter under Section 9-3(a) of the Criminal Code (Ill. Rev. Stat. 1963, Chap. 38, Par. 9-3(a)) and was sentenced to one to ten years in the penitentiary. He appeals.

On December 6, 1963, about 6:30 or 7:00 P.M., defendant entered a cocktail lounge on the south side of Chicago. At the time some ten to twenty patrons were in the establishment. Defendant spoke to a friend, Curtis Waites, for a while and then proceeded to a booth occupied by Lucille Johnson, Tonie Brown, a man named Willie and an unidentified man. Defendant committed certain improprieties upon Lucille Johnson which led to a heated argument between defendant and the man named Willie. Willie put his hand into his pocket, whereupon defendant drew a revolver and told Willie to "bring his hand out of his pocket and bring it out clean." Willie brought his hand out with a package of cigarettes.

At that point Ronald Crawford, the bartender, came from behind the bar, stood between defendant and Willie, and attempted to stop the argument. Mr. Crawford testified that he stood facing defendant with his hands on defendant's waist for some five to ten minutes, talking to defendant and telling him to put the revolver away and that such activity did not make sense and could only lead to trouble for defendant. The witness stated that he almost had defendant and Willie quieted down when defendant's friend, Curtis Waites, walked up to defendant and

slapped the revolver, saying, "put the pistol up." The slap caused the revolver to discharge and the bullet struck Waites in the stomach. Defendant picked Waites up and carried him to an automobile. Waites was driven to the hospital where he subsequently died from the gunshot wound. When questioned by the police at the hospital before his death, Waites refused to disclose who had shot him, saying that it was an accident. Della Mae Brooks, Waites' companion at the cocktail lounge, testified Waites sent her to the washroom when the argument between defendant and Willie started and that he, Waites, stated he was going to try to stop the argument because he did not want defendant to get into trouble.

Tonie Brown, the woman sitting in the booth with Lucille Johnson, testified that when defendant drew the revolver he stated "he didn't care about nobody." She admitted she was under the influence of alcohol at the time and further, because of this, she was unable to remember whether any words passed between defendant and Waites prior to the shot.

Defendant did not testify.

Defendant's position is that his conduct was not reckless, that the shooting was an accident, and that therefore a finding of guilty of involuntary manslaughter was improper.

Section 4-6 of the Criminal Code (Ill. Rev. Stat. 1963, Chap. 38, Par. 4-6) defines recklessness as:

> "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation...."

Section 9-3(a) of the Criminal Code (Ill. Rev. Stat. 1963, Chap. 38, Par. 9-3(a)) defines the crime of involuntary manslaughter as:

"A person who kills an individual without lawful justification

> commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly."

Assuming, but not deciding, that defendant's act of drawing the revolver was justified for the reason that Willie put his hand into his pocket when the argument began, giving rise to a normal apprehension that he was reaching for a weapon, defendant had absolutely no reason to expose the loaded revolver in a crowded establishment under these circumstances after Willie brought nothing more than a package of cigarettes out of his pocket. The heated argument was still in progress; the reason for exposing the revolver had ceased; yet, defendant failed to put the revolver away, even after having been requested to do so by the bartender and having been apprised of the fact that it could only lead to trouble for defendant. The statement attributed to him by Tonie Brown, that "he didn't care about nobody," and the fact that he was engaged in a heated argument clearly indicate that defendant's emotional condition was not conducive to his exposing a loaded revolver, a dangerous weapon per se, especially after the reason for which it had been drawn had ceased for some five or ten minutes. Defendant could not be persuaded to put the revolver away. It was highly probable that someone would attempt to wrest the revolver from him or in some way interfere with him or the revolver, causing it to discharge. See, for example, People v. Camberis, 297 Ill. 455, where defendant's act of recklessly driving an automobile resulted in a passenger's taking hold of the steering wheel in an attempt to avoid a collision with a street car and the automobile thereby striking the deceased who was alighting from the street car. Under the circumstances here involved, the trial judge could reasonably have found defendant's act of exposing a loaded revolver was reckless and in utter disregard of the safety of others.

Defendant maintains the testimony of Lucille Johnson and Tonie Brown is rendered valueless for the reason that they were intoxicated at the time of the incident. No evidence in the record supports the contention that Lucille Johnson was intoxicated. The mere fact that she had been drinking does not give rise to the conclusion that she was intoxicated.

While Tonie Brown did admit she was intoxicated, this admission, in view of the record, relates to her credibility alone. Her account of the entire incident corresponds substantially to those rendered by Lucille Johnson and Ronald Crawford. Consequently, the degree of Tonie Brown's intoxication and its effect on what she was able to observe at the time was a question of fact for the trial judge to determine in the light of all the evidence in the case.

The case of People v. Pellegrino, 30 Ill.2d 331, cited by defendant in support of the contention that Tonie Brown's intoxication rendered her testimony valueless, is not in point. In the Pellegrino case, the witness, at the time of the incident, was in the fourth week of a seven-week period of drunkenness. This state of intoxication had an effect upon her to such degree that at the time of the occurrence she testified she was unable to walk five feet without holding onto the wall and that she was unable to recognize a party only three feet from her who was aiding an injured person. Clearly, no such degree of intoxication appears here as to Tonie Brown.

That defendant may not have intended to shoot Curtis Waites, or that he may not have intended to fire the revolver at all, is immaterial. People v. Flanagan, 338 Ill. 353. The fact is that defendant, for some five to ten minutes and for absolutely no reason, consciously took the unjustified risk of exposing a loaded revolver which could discharge in a crowded establishment, while engaged in a heated argument.

He could not be persuaded to put the revolver away and as a result a man was killed. Under these circumstances his activity was reckless and in utter disregard of the safety of others.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49729

(60 I.A.2 308)

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ARTHUR S. TIMMONS (Impleaded),
Defendant-Appellant.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Criminal Court of Cook County, seeking to reverse a judgment of that court against defendant in which he was sentenced to serve a minimum of one year and a maximum of three years in the Illinois State Penitentiary on a finding of guilty of the charge of burglary. Defendant waived a trial by jury.

Defendant testified that during the afternoon of September 26, 1963, he met Leonard Nabors; that Nabors was trying to move a television set from the back porch of an apartment; that defendant offered to help if compensated; that Nabors stated that he needed a car; that defendant referred Nabors to a resident of the neighborhood, one Willie Carter; that Carter accepted Nabors' offer of three dollars to move the television set in Carter's car; that Nabors then offered defendant three or four dollars to help him move the television set from the first floor stairway in the back of the apartment building to Carter's car; and that defendant did so help Nabors, in full view of the janitor of the building, one Melvin McDonald. Defendant further testified that he did not go up to the porch where the burglarized apartment was located, and did not see anything suggestive of a burglary.

Detective John Ford of Area Four Burglary Unit of the Chicago Police Department testified that defendant first denied and then admitted being on the scene and carrying away the set with Nabors. Ford also testified that defendant told him that Nabors had told him (the defendant) that he had just "cracked a crib" and needed help in carrying away a television set. Detective Ford further testified that "cracking a crib"

is a phrase which means "having burglarized a place."

Melvin McDonald testified that he observed defendant and Nabors carrying a television set down the stairs of an apartment at 1501 South Komensky Avenue on September 26, 1963.

Defendant was charged with burglary in a one count indictment, along with Willie Carter and Leonard Nabors. Defendant waived a jury. Defendant was sentenced and this appeal followed.

The statutory elements necessary to convict a person of the crime of burglary are: (1) the entry or act of remaining; (2) into or within a building, house trailer, watercraft, aircraft, railroad car, or any part thereof; (3) without authority; (4) and with intent to commit a felony or theft. Ill. Rev. Stat. (1963) Chap. 38, Par. 19-1.

Defendant's position is one, there was insufficient circumstantial evidence introduced that he entered into or remained within the apartment and two, there was insufficient circumstantial evidence introduced that he intended to commit a felony or theft. Defendant concludes that his actions were consistent with those of an innocent person and that because the evidence was circumstantial in nature it can be explained upon a reasonable hypothesis consistent with the innocence of defendant.

At the outset, we feel the evidence, even if circumstantial, can be explained upon a reasonable hypothesis of guilt. There was sufficient evidence, from the testimony of the janitor and Detective Ford, that defendant aided Nabors. Defendant was a party to the activities of Nabors and Nabors entered into the apartment without authority. We conclude defendant was a party to the burglary. Thus, we only need decide whether or not there was sufficient evidence introduced to show that defendant intended to commit a burglary.

Defendant contends there was no evidence presented by the State to indicate that defendant had the requisite criminal intent when he aided in the moving of the television set, other than the statement

allegedly made by defendant to Detective Ford that Nabors told him that he was in the process of "cracking a crib" when the two met on September 26, 1963. According to Detective Ford this statement meant that Nabors told defendant that he was committing a burglary. This statement was denied by defendant. True, the State did not produce another witness to corroborate this alleged admission by defendant, though there were three other witnesses present at the time the alleged admission was made. True also, is the fact that Detective Ford and the defendant were in disagreement as to what was said at the time of arrest and repeated in the squad car. However, the trial court did not have to disbelieve Ford because of the disagreement. In People v. Crenshaw, 15 Ill.2d 458, 155 N.E.2d 599 (1959), cert. denied 359 U.S. 997 (1959), the court stated at page 461:

> Although defendants attach great weight to the failure of the youthful witnesses to identify them, we have long been committed to the principle that the testimony of one witness as to identification, if positive and the witness credible, is sufficient to convict even though the testimony is contradicted by the accused....

And at page 468 of the same case the court said:

> A jury having been waived, it was the province of the trial court to determine the weight and credibility of the testimony, to resolve the conflicts therein, and to make its findings of guilt or innocence. In view of the opportunities of observation enjoyed by the trial court, its judgment should not be set aside by this court unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt as to a defendant's guilt....

There is no need to further elaborate on this point, however, as we also find, that the evidence was not fully circumstantial.

Defendant's contested oral admissions to Detective Ford, concerning his co-defendant Nabors' statement to him that he, Nabors, had just "cracked a crib" and needed help to carry away a television set, which help he would pay for, and defendant's denial and later admission as to his being at the scene of the crime, was not circumstantial evidence. This was direct evidence and together with the testimony of the janitor, who identified defendant at the apartment, it established

the corpus delicti beyond a reasonable doubt. In People v. Robinson, 14 Ill.2d 325 at page 331, 153 N.E.2d 65 (1958), the court states: "Circumstantial evidence is indirect proof of the principal facts of a case, which principal facts can only be inferred from one or more circumstances directly established." We agree with defendant that mere presence at the scene is only a circumstance but there was more than mere presence involved in the instant case. Detective Ford's testimony indicated defendant had a knowing presence plus a chance for monetary gain by the transfer of the set from the apartment.

The State further contends that defendant's interview with Detective Ford constituted an admission of guilt. We agree with this contention. Defendant told Ford that Nabors had told him that he had "cracked a crib" and needed help to carry out a television set. Thus the burglary, which Nabors started, was still progressing and needed defendant's help. Defendant in turn enlisted the aid of a third man. Defendant was, by his own admission, a party to the burglary. This admission was corroborated by the testimony of other witnesses.

Finally, defendant contends that the People's position concerning the acts of defendant is contrary to universal human experience and cites People v. Coulson, 13 Ill.2d 290, 297, 149 N.E.2d 96 (1958), where the court said:

> Where the testimony is contrary to the laws of nature, or universal human experience, this Court is not bound to believe the witness.

The defendant maintains that it would be difficult for a reasonably prudent person to believe that he would jeopardize his freedom by committing an act of burglary in the middle of an afternoon, in front of a witness, with the aid of a resident of the neighborhood who was known to the witness, all for a promised three dollars. We are not going to examine the motive of defendant in carrying the television set down the

stairs for the sum of three or four dollars. The trial court heard the testimony of the witnesses and determined that defendant had participated in the burglary. We will not upset that determination.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

No. 64-80-M

In The (60 I.A.2 319)

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

Abstract

JACK W. CRISMAN and LILLIAN M. CRISMAN,

Plaintiffs-Appellees,

vs.

JOHN HENNES and GORDON L. BOARDMAN,

Defendants-Appellants.

Appeal from the Circuit Court of Rock Island County, Illinois.

Honorable Clifford W. Hobart Magistrate Presiding.

ALLOY, P. J.

This cause is before us on appeal from a judgment entered by a magistrate of the Circuit Court of Rock Island County in favor of Plaintiffs Jack W. Crisman and Lillian M. Crisman in the sum of $207.27 as against Defendants John Hennes and Gordon L. Boardman. The facts giving rise to the action are undisputed. Plaintiff Lillian M. Crisman was driving an automobile which she owned with her husband in an easterly direction on a street in East Moline, Illinois, at about 7:15 A.M. on January 29, 1960. There were two lanes of travel in each direction and traffic was heavy. The light at the intersection ahead of Plaintiff Crisman turned red and the line of vehicles preceding her stopped in the innermost lane. She applied her brakes and her car skidded on some ice. She succeeded in stopping her car without striking any other vehicles but the automobile was turned so that it

blocked the two eastbound lanes. Defendants' truck was being driven to the rear of Plaintiffs' vehicle and, immediately after the Plaintiffs' vehicle had come to a stop, Defendants' vehicle also skidded on the ice and struck the right side of Plaintiffs' vehicle. Damages were stipulated. Plaintiffs sought to recover for damage to the automobile of Plaintiffs, and Defendants counterclaimed for damages to the truck. Trial by jury was waived and after hearing the evidence, the magistrate entered judgment for Plaintiffs and denied the counterclaim.

On appeal in this Court, Defendants contend that the testimony of the Plaintiff-driver, as the only witness, shows as a matter of law that Plaintiff-driver was negligent and that the Defendant-driver was in the exercise of due care and that, therefore, the magistrate should have denied recovery to Plaintiffs and have entered judgment in favor of Defendants on the counterclaim.

Both parties recognize that where it is contended that plaintiff is negligent as a matter of law or that defendant is not negligent as a matter of law, then plaintiff is entitled to the benefit of all of plaintiff's evidence together with all reasonable inferences therefrom (LINDROTH v. WALGREEN CO., 407 Ill. 121, 133-135). Defendants, however, contend that the cases announcing that principle were simply upholding a jury verdict or a court finding on conflicting evidence. It is contended that under the precedent of MISZCZAK v. MAYTAG CHICAGO CO., 11 Ill. App. 2d 496, that on a stipulated set of facts or an undisputed set of facts there is no fact issue for the trier of fact to resolve and, therefore, the sufficiency of the evidence becomes a question of law.

Under the facts as shown in the record, after the light turned red and the line of cars stopped ahead of Plaintiffs' and Defendants' vehicles, Plaintiff succeeded in stopping even though she skidded on the ice, but Defendants did

not succeed in stopping their vehicle before running into the vehicle driven by Plaintiff-driver. Under this set of facts it could reasonably be concluded by the trier of fact that the Defendants were following more closely than was reasonable and proper having due regard for the traffic and highway conditions contrary to the statutes of this State (1963 Illinois Revised Statutes, Chapter 95-1/2, Section 158).

We have frequently indicated that where a cause is heard by a Judge rather than a jury, his finding is entitled to the same weight as is accorded a jury verdict. The evidence, viewed in the light of the statutes referred to, and with reasonable inferences arising therefrom would support a judgment for the Plaintiffs. The evidence, on the record, would not be such that reasonable minds could not differ. To find a Plaintiff guilty of contributory negligence as a matter of law would require a situation where all reasonable minds would reach the conclusion, after assuming all facts as presented by the Plaintiff and all reasonable inferences to be drawn therefrom in her favor, that the Plaintiff was nevertheless guilty of contributory negligence (CAMPBELL v. CITY OF PERU, 48 Ill. App. 2d 267, 271). ↑ 198 NE 2d 719 There were questions of fact for the trier of fact to determine (WALLIS v. VILLANTI, 2 Ill. App. 2d 446). ↑ 120 NE 2d 76 On the record in this case, the magistrate could reasonably have concluded that Plaintiffs exercised ordinary care and that Defendants were negligent, and it is apparent from the record that all reasonable minds would not agree that Plaintiff-driver was negligent as a matter of law or that Defendants were not negligent as a matter of law.

The judgment entered in the Circuit Court of Rock Island County will, therefore, be affirmed.

Affirmed.

Stouder, J. and Coryn, J. concur.

Cidv 60 #2

(388)

#64-140 (60 I.A. 388) Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

A

MICHAEL F. BONAMARTE, SR., Plaintiff-Appellee, vs. CITY OF HIGHLAND PARK, Illinois, Defendant-Appellant.	)	Appeal from the Circuit Court of Lake County

MR. PRESIDING JUSTICE ABRAHAMSON delivered the opinion of the Court:

This is an appeal from a judgment of the Circuit Court of Lake County in which the jury awarded plaintiff the sum of $2,003.95 for overtime pay, and $36.20, an amount charged plaintiff by defendant for alleged photostatic copies.

Plaintiff was a member of the Highland Park Police Department from 1932 to September of 1963, when he was discharged for alleged conduct unbecoming an officer. In Count I of his complaint plaintiff alleged that, in addition to his other duties, he was in April of 1958, appointed Juvenile Officer. The Chief of Police, in the presence of Captain Lempenin, informed him that at that time Captains and the Chief did not receive overtime because they were heads of Bureaus, and that, since the plaintiff would be head of a Bureau as Juvenile Officer, he would not be paid for overtime services rendered in that position. Shortly after his appointment as Juvenile Officer, plaintiff requested authority to institute a program which had been under discussion for some time, known as "Code for Kids". This program, conceived

by plaintiff, consisted for the most part of the preparation and distribution of an elaborate and imaginative set of posters. The program was instituted by plaintiff with the approval of the Chief of Police with the understanding that there would be no overtime for the time spent on this program outside of his regular hours. During the period in question, plaintiff performed his regular duties as Identification Officer and also as Juvenile Officer. In addition to his regular duties and in connection with the program known as "Code for Kids", plaintiff made and assembled elaborate posters in his home. These he distributed to schools, doctor's and dentist's offices and other public places in the community. He appeared on several television programs to explain this program and addressed other various and sundry groups. To the extent that his activities in promoting this program were done during regular hours, he was compensated at regular pay rates. He was not, however, paid additional compensation for the time devoted to this program outside his regular hours of duty.

On December 1, 1959, Captain Lempenin retired. Captain Lange was appointed to succeed him and was Captain of the Department until his retirement in December of 1961. Upon Captain Lange's retirement, plaintiff learned that in December of 1959, Captain Lempenin had been paid, in addition to regular salary, an additional $1100.00, and that upon Captain Lange's retirement, he also had received compensation in addition to regular salary. The Chief of Police testified that upon the retirement on December 1, 1959 of Captain Lempenin, his pay records show no payments of overtime in 1957, 1958 and 1959, but that he did receive in December of 1959, payment for

accrued vacation and holiday time; that Captain Lange's pay record shows that between June of 1959 and January of 1960, he received overtime pay resulting from a special agreement with the Chief of Police, having to do with a training period to train him for his position as Captain and that additionally he received extra pay for accrued vacation and holiday time and for 22 days of overtime he put in as Acting Police Chief during the absence of the Chief. Plaintiff, in his testimony, characterized these records with respect to both captains' pay "as being camoflage" for overtime pay.

We do not deem it necessary to comment on the conflicting contentions of the parties as to whether (1) the closing arguments of plaintiff's counsel were prejudicial, (2) accepting a lesser amount bars suit to compel payment for the balance of salary due, or (3) the verdict is contrary to the manifest weight of the evidence. Accepting all evidence in a light most favorable to plaintiff, we believe the controlling issue is whether, as a matter of law, plaintiff can avoid his agreement to do extra work without extra compensation. Defendant relies upon the rule of law that an employee may not recover extra or overtime compensation when such extra or overtime compensation was not agreed upon, or contemplated by the parties. Western Manufacturers' Mutual Insurance Company v. Boughton, 136 Ill. 317 (1891); County of Christian v. Merrigan, 191 Ill. 484 (1901); Sanitary District of Chicago v. Burke, 88 Ill. App. 196 (1899); Levi v. Reid, 91 Ill. App. 430 (1899); Mitchell v. City of Chicago, 259 Ill. App. 301 (1930); Habryl v. County of Cook, 298 Ill. App. 479 (1939). Plaintiff seeks to avoid the law announced

in those cases. Plaintiff contends that the Chief's statements with respect to overtime compensation not being receivedby Captains was not true. Plaintiff asserts that the statement of the Chief, which induced him to accept the position, was false and thereby nullified the agreement and placed the plaintiff in a position to demand overtime compensation. To avoid the terms of an agreement on the grounds of a false representation, it must be shown that the misrepresentation was known by the speaker to be false and must have been made with the intent to deceive. Dunbar v. Bonesteel, 4 Ill. 32; American Travel and Hotel Directory Co. v. Curtis, 236 Ill. App. 236.

The record here is devoid of any evidence that the Captains or the Chief of Police were receiving any overtime prior to and at the time of plaintiff's agreement. The trial Judge, therefore, should have directed a verdict in favor of the defendant as to Count I of the complaint.

In Count II of his complaint, plaintiff alleged defendant deducted $36.20 for alleged photostatic copies of documents which plaintiff stated he neither requested nor received. Plaintiff denied any photostatic copies were made for him by the defendant for which he did not pay. Defendant offered circumstantial evidence that it had supplied plaintiff, at his request, with a substantial number of photostatic copies for which he did not pay.

From the evidence above set forth, it is apparent there was a conflict in the testimony and as a reviewing Court we cannot

substitute our judgment for that of a jury in passing on the weight of the evidence and the credibility of the witnesses. Collister v. Allen E. Kroblin, Inc., 30 Ill. App. 2d, 288; Meyer Construction Co. v. Drobnick, 49 Ill. App. 2d 51. Accordingly, the verdict as to Count II must be affirmed.

REVERSED AS TO COUNT I

AFFIRMED AS TO COUNT II

MORAN, J. and DAVIS, J. concur.

50357

(60 I.A.2d 440)

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Defendant in Error,	)	WRIT OF ERROR TO THE
	)	
vs.	)	CRIMINAL COURT OF
	)	
PRESTON BONDS (Impleaded),	)	COOK COUNTY.
	)	
Plaintiff in Error.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant, Preston Bonds, was tried jointly with Jenkins Fields on a charge of burglary. Both were found guilty, and each was sentenced to the penitentiary for a term of two to four years.

Defendant, Preston Bonds, sought review by writ of error in the Illinois Supreme Court, alleging as the basis for its jurisdiction that he had been deprived of his constitutional and statutory right to a speedy trial. After finding that "this question is not open to review in this court," the Supreme Court transferred the cause to this court "for a determination of the nonconstitutional issues raised by the defendant." People v. Bonds, 32 Ill.2d 94, 203 N.E.2d 884 (1965).

Defendant Bonds' remaining contentions are: (1) that the evidence did not prove his guilt beyond a reasonable doubt, and (2) "serious error was committed by the Trial Judge in assuming the duties of an advocate even though the Defendant was tried without a jury."

On December 3, 1962, the apartment of Mr. and Mrs. Robert L. Gerald, located at 4724 South Ellis Avenue, Chicago, was burglarized. A television set, men's and women's clothing, men's shoes, and a bankbook were among the articles taken. A guitar and amplifier were missing from the apartment and were later found in the hallway and

returned to them on the evening of the same day.

Mrs. Dorothy Gerald testified that their apartment was on the second floor of a 3-story apartment building. On December 3, 1962, she returned to the apartment with her husband, and they found that it had been burglarized, and they called the police. She described the missing articles in detail and identified some of them in court. "On December 6, I saw my husband's pants and a pair of his shoes" on defendant, Jenkins Fields, "in the Court Building and these shoes and pants belonged to my husband." On December 4, some of the articles were recovered by her husband.

Freddie Lee Floyd testified that at 1:30 P.M. on December 3, he saw Fields come downstairs from the second floor. "He got into a blue 1953 Ford. Two-door sedan. I saw a big bundle in the car. This bundle was wrapped in a sheet. There was a person sitting in the car when I first saw it. * * * He was sitting in the driver's seat. When Mr. Fields came down the stairs, he asked me if I wanted to park. I told him, 'Yes.' He was in my parking place. He got in the car." Floyd found the guitar and amplifier in the hallway and later delivered them to Gerald. During the trial, Floyd identified Fields but did not identify Bonds.

Martin Woods, a police officer assigned to "Burglary Unit Area 1," arrested Fields on December 4, 1962, in an apartment at 320 East 38th Street, and there found articles taken in the Gerald burglary. Woods testified that Fields told him, in the presence of Officer Perkins, that "he had brought this property to the apartment. Jenkins Fields stated that he got this property from 4724 South Ellis Avenue in the second floor apartment. He stated that he went into the apartment with a friend of his, who had a key to that particular apartment door and removed the contents

from this apartment in a sheet or spread off of the bed. Jenkins Fields stated that his friend and accomplice took a sheet or a spread and loaded various items onto these sheets or spread and bundled them up and removed them through the rear of the apartment and placed them into an automobile. The automobile was a 1953 Ford, bluish in color. As I arrived at 320 East 38th Street I had an opportunity to observe this car which was parked in front of 320 East 38th Street about which I talked to the Defendant Fields." Woods further testified that that night in the assembly room at the police station, in the presence of Fields, Robert Gerald identified the recovered articles as his property. Also, Gerald said to Fields, "the pants and shoes you are wearing belong to me." Jenkins Fields stated, "I know they do. Do you want them back?" Mr. Gerald said, "you can keep them."

As to defendant Bonds, Officer Woods testified that he arrested Bonds on December 28, 1962, in the corridor of the Criminal Court Building at 26th and California Avenue, Chicago. "I identified myself as an officer and asked him if his name was Preston Bonds and after he said yes, I told him he was under arrest for burglary. He said: 'I knew you were looking for me.' I then asked him what happened to the other property that I had not recovered and then Bonds went on to tell about certain property that he had disposed of. Bonds said during the conversation which took place in the corridor at the time of the arrest, * * * he told me he went into an apartment with an accomplice who used a key to get into the apartment at 4724 Ellis and stated he removed certain items therefrom, namely: the record player, portable TV, amplifier and guitar. Bonds stated that the amplifier and guitar were left in the hall at the place of the crime. * * * what was removed was removed by the spreading of

a blanket or sheet down, picked up various items and left * * * by an auto that belonged to a fellow that he was with who was also his friend. He stated it was a Ford, but could not recall the color. Bonds stated that he disposed of the property in various neighborhoods after they left the scene. Bonds further stated that he and his accomplice went into these certain neighborhoods and got unknown people on the street and made sales for various items that they had in the car."

Woods further testified that later on the evening of the same day of the arrest, at the police station and in the presence of Officer Robinson and other officers, Bonds substantially repeated to Woods the details of the burglary and the street sales. "After they left their last stop and purchased 'stuff' he stated they had an argument. At that time he departed." Woods identified both Fields and Bonds. On cross-examination, Woods denied that Bonds told him "the night that I arrested him that he had bought the articles from a colored man on the 4th day of December, 1962."

Another witness for the State, Police Officer Robinson, also assigned to "First Area Burglary Unit Detail," testified as to the arrest of Bonds on December 28, 1962, in the Criminal Court Building. He was present both times that "Detective Woods" questioned Preston Bonds about the burglary, "and Bonds stated he assisted Jenkins Fields in the commission of this burglary. It was stated the location of the burglary was 4726 Ellis and Bonds stated that a radio, television set and other items were taken from the apartment of the victim." He testified in detail as to what Bonds had stated as to the articles taken and their disposal. On cross-examination, he testified, "I came along to assist Officer Woods in the apprehension and bringing the man into the area."

Both defendants testified and denied the burglary or that each knew the other. Bonds further testified that on December 3, 1962, "I was downtown taking in a movie. This is where I was all day." He further said that when arrested, he told Officer Woods, "I don't know nothing what you placing me under arrest for, I don't know anything about no burglary. * * * I have at all times denied any knowledge of this burglary from the day I was outside of the Court Room and Officer Woods arrested me and I don't know a thing about it. Nothing was found in my possession."

The court thereupon found both defendants guilty as charged, and after hearing "matters in aggravation and mitigation," sentenced both defendants.

Initially, we consider defendant Bonds' contention that "where quality of the evidence is so unsatisfactory it will reverse a conviction of guilty." Defendant Bonds argues that his conviction rests only on the testimony of an alleged confession to a police officer, and that it is well settled that "where the testimony of a witness is contradictory, improbable or incomplete, a Court may disregard it in its entirety." Cited is Mannen v. Norris, 338 Ill. 322, 170 N.E. 273 (1930), where the court said (p. 327):

> "If his testimony is contradictory of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him."

Other cases cited by the defendant include People v. Pellegrino, 30 Ill.2d 331, 196 N.E.2d 670 (1964), and People v. Butler, 28 Ill.2d 88, 190 N.E.2d 800 (1963).

The State argues that "defendant's oral confessions were corroborated by each and every witness for the State. * * * His

confessions relate the goods taken, the date of the crime, the method of removal of the stolen goods (wrapped in a sheet), the method of entry (with a key), the means of transportation to effectuate the escape (Ford), and the fact that a guitar and amplifier were left in the hallway of the building. Both Officers Woods and Robinson related in similar language, the contents of Bonds' oral confessions."

We agree with defendant that "if a conviction is to be sustained, it must rest on the strength of the People's case and not on the weakness of the defendant's case. * * * The foregoing principle of law is a corollary of the presumption of innocence to which a defendant in a criminal case is entitled, and to the rule that the People have the burden of establishing the defendant's guilt beyond a reasonable doubt." People v. Coulson, 13 Ill.2d 290, 296, 149 N.E.2d 96 (1958).

While the record before us contains neither direct proof of the participation by defendant Bonds in the burglary, nor proof of actual physical possession by him of any of the articles taken, we do have the direct testimony of police officers as to his detailed admissions of participation in the burglary charged. Both were cross-examined at length, and we fail to find that their testimony "is contradictory of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief." The trial judge saw and heard the witnesses and observed their manner of testifying, and was in a better position to determine the weight to be given to their testimony than we are. The only contradictory evidence in the record is that of the defendants, wherein they make a blanket denial of both the burglary and the admissions. We cannot say that there is such an inherent improbability in the testimony of

these two police officers, so as to induce the trial court to disregard it, even in the absence of conflicting testimony. In a bench trial, as said in People v. Washington, 27 Ill.2d 104, 110, 187 N.E.2d 739 (1963):

> "It is the function of the trial court to determine the credibility of the witnesses and to evaluate conflicting evidence, and a conviction based thereon will be reversed on review only where the evidence is so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of the defendant's guilt. * * * The evidence in this record is not of such character, nor does any other basis appear to justify our interference with the findings of the trial court."

Defendant also complains of the conduct of the trial by the trial judge, and that "a judge should not play the role of an advocate." Cases cited are People v. Rivers, 410 Ill. 410, 102 N.E.2d 303 (1951); People v. Wallenberg, 24 Ill.2d 350, 181 N.E.2d 143 (1962); and People v. Lurie, 276 Ill. 630, 115 N.E. 130 (1917).

The State argues that the trial judge "took the defense counsel's place and carefully questioned the People's witnesses to ascertain the true facts. If anyone was aided it can only be the defendant. His counsel was objecting and the court attempted to clarify the truth." While we note that the trial judge actively participated in the examination of the witnesses, we find no prejudicial error. From our careful examination of this record, we cannot say that the court abused its discretion in examining witnesses or in its rulings, or displayed hostility toward the defendant, or that any of its actions was prejudicial to defendant's cause. We believe the defendant had a fair trial.

We conclude that the proof was sufficient to satisfactorily establish defendant's guilt beyond a reasonable doubt, and as we find no reversible error, the judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

BURMAN, P.J., and KLUCZYNSKI, J., concur.
Abstract only.

50053

(60 I.A.2 462)

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THEODORE R. LEWIS, Defendant-Appellant.	)	APPEAL FROM CRIMINAL COURT OF COOK COUNTY

SUPPLEMENTAL OPINION ON REHEARING

MR. JUSTICE BRYANT DELIVERED THE SUPPLEMENTAL OPINION OF THE COURT:

In our opinion we made the statement that an answer made by a police officer, to the effect that the appellant admitted committing the crime, could not be urged as grounds for reversal because no objection was made to that answer at the trial. The appellant, in his brief on rehearing, points out that such a statement overlooks a section in the new Code of Criminal Procedure: Chapter 38, Ill. Rev. Stat. (1963) Sec. 121-9 (a). That section reads as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

The committee comments to this section point out that the first sentence continues the previous Illinois doctrine of insubstantial error and involves no change in the law of this State. We have reviewed the record and believe that the evidence is overwhelming in showing the appellant's guilt. We hold, therefore, that the error was not substantial in view of all the evidence in the case and we will not reverse for a new trial because of it. People v. Skelley, 409 Ill. 613, 100 N.E.2d 915 (1951).

In the original opinion we also declined to reverse the sentence imposed by the Court below even though it refused to grant a hearing on mitigation and aggravation. We pointed out that the appellant's background had been fully brought out during the course of the trial, and that while there was error in refusing to hold a

hearing in mitigation and aggravation, we felt that it was not substantial enough to require sending the matter back to the Court below. Upon further consideration, we have decided to affirm that part of the judgment convicting the defendant and to reverse that part of the judgment which sentences him, with directions to hold a hearing in accordance with the provisions of Chapter 38, Ill. Rev. Stat. (1963) Sec. 1-7 (g). People v. Everard, 55 Ill. App.2d 270, 204 N.E.2d 777 (1965).

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS TO CONDUCT A HEARING IN MITIGATION OR AGGRAVATION AND TO ENTER A SENTENCE THEREON.

BURKE, P.J., and LYONS, J., concur.

50053

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
THEODORE R. LEWIS,
Defendant-Appellant.

APPEAL FROM
CRIMINAL COURT
COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered in the Criminal Court of Cook County, Illinois, July 29, 1960. A jury found the appellant Theodore Lewis, guilty of armed robbery and he was sentenced to 50 years to life in the Illinois State Penitentiary. The appellant claims he was convicted on evidence insufficient as a matter of law, that an erroneous instruction was given the jury, that an oral confession was improperly admitted and that the sentence was imposed contrary to law.

The facts of the case are as follows: On March 21, 1960, the Cyril Lounge at 735 East 36th Street, Chicago, was held up by two masked gunmen. There were several persons in the Lounge at that time, all of whom saw the gunmen, but because of their masks no one knew who they were.

While the robbery was taking place, a janitor of the hotel in which the Lounge was located, looked through the door and saw two men with masks and guns. He immediately notified the switchboard operator at the hotel, who in turn called the police.

The two men left through a rear door and within a matter of seconds the police arrived. They obtained a brief description of the gunmen and set out in search of them. Within a minute or two one of the officers saw the appellant and another in an areaway between the hotel and the building next to it. The appellant had the money taken from the Lounge in a cigarette carton in which the two gunmen had put the money when they fled from the Lounge. The men had in their possession guns later identified as those used by the hold-up men. The men were wearing clothing which matched the description witnesses had given the police.

The appellant claims he and his friend were sitting behind the hotel drinking when two men ran out and placed a carton under the rear porch of a neighboring building. He says the men then ran away and he and his friend examined the contents of the carton, saw it contained money, and were leaving with the money when the police came upon them.

Having set forth briefly the cases of the People and of the appellant, we shall consider the merits of their arguments.

It is first claimed that the appellant was convicted on insufficient evidence. The appellant cites People v. Guardino, 13 Ill.2d 58, 147 N.E.2d 338 (1958). It was held in that case that where the People's case rests, as it does here, on circumstantial evidence, the proof must be such as to produce a reasonable and moral certainty such as to exclude the reasonable possibility of innocence. If there was any grave and serious doubt of guilt, according to this decision, the conviction must not be allowed to stand.

In the case at bar, the appellant and his co-defendant were apprehended with the same clothes the hold-up men were wearing, with the money taken from the Lounge, within two minutes of the robbery, and within 50 feet of the scene of the crime. We feel this evidence gives the People a very strong case. The appellant claims he found the money, but the jury is not bound to believe him. There is no evidence other than the word of these men to support their claim, and while we cannot ignore their testimony, we cannot say that it creates such a doubt as to their guilt that the evidence is insufficient as a matter of law. The evidence supports the verdict.

The appellant next claims that the jury was erroneously instructed that the unexplained possession of the stolen goods by the appellant may raise an inference of his guilt. He cites in support of this claim, People v. Browning, 302 Ill. App. 297, 23 N.E.2d 736 (1939). In that case the jury was instructed that a presumption of guilt arose

from the unexplained possession of the stolen goods, and that the appellant had the burden of persuasion of rebutting that presumption. That was not the instruction given in the case at bar. Here the jury was instructed that recent possession may raise an inference of guilt, but the jurors were also instructed that the appellant was presumptively innocent. The Court also instructed the jury that they could not disregard the testimony of the accused merely because they were accused of a crime, and that with everything taken into account the burden was on the People to prove them guilty beyond a reasonable doubt. We feel this is materially different from a case where a court tells the jury the defendant in a criminal trial has the burden of showing himself innocent once stolen goods are found in his possession.

We also point to the case of People v. Flowers, 14 Ill.2d 406, 152 N.E. 838 (1958). There the Supreme Court held the trial court properly instructed the jury that unexplained possession of stolen articles was evidence of guilt. It seems, therefore, that it was the wording of the instruction in People v. Browning (supra) and not the general proposition of law that was held objectionable. We find that the instruction on recent possession was properly worded, and that reading the instructions as a whole, there was no reversible error.

The third claim made by the appellant is that the Court below permitted an oral confession to become part of the evidence heard by the jury without first determining the voluntary nature thereof. During the trial, a police officer who was assigned to this case took the stand, and during cross-examination by the appellant's attorney, the following occurred:

"Q. Did you ask them [Payton and Lewis] any question other than the given questions?

"A. I asked them if they would like to give a statement and they refused.

"Q. In their refusal, did they deny committing this holdup?

"A. No, contrary. They admitted the holdup to me orally."

We have read both the abstract and the record and no objection was made to this by appellant's counsel. This cannot be urged as grounds for reversal for the first time on appeal. Burns v. Schmidt, 22 Ill.2d 47, 174 N.E.2d 188 (1962), People v. Hurry, 385 Ill. 486, 52 N.E.2d 173 (1944).

Finally, it is urged that the sentence imposed was invalid because the trial court refused to afford the appellant an opportunity to present evidence in mitigation of the offense. Ill. Rev. Stat., 1959, ch. 38, § 732 reads in part:

> "In all cases where the court possesses any discretion as to the extent of punishment, whether defendant has pleaded 'guilty' or 'not guilty', after conviction, it shall be the duty of the court to hear evidence, as to aggravation and mitigation of the offense."

At the sentencing of the appellant, immediately upon the verdict being entered, his counsel asked to be heard, and the Court below refused him an opportunity, contrary to the mandate of this statute. The People, however, point out that the entire background of the appellant was brought out at the trial, and the appellant has shown nothing which would mitigate the offense that was not before the Court when he passed sentence.

It was brought out at the trial that the appellant had been convicted of auto tampering in 1943, that he had been convicted of petty larceny both in 1943 and 1944, that in 1947 he had been convicted of two robberies and was placed on probation; that the probation was violated the following year; that the appellant had been educated to the ninth grade and was married and the father of three children; that he was not a drug addict and finally that he had a condition of the spine known as scoliosis.

The Court knew about appellant's background and we have been told of nothing additional that he wished to have known before passing sentence. We will not reverse a case where the error was one of form only and not one of any substance.

We hold, therefore, that there was no reversible error in the trial and the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

A

49654

60 I.A.2477

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
FLETCHER WEST,
Defendant-Appellant.

WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment convicting defendant, Fletcher West, of the unlawful sale of narcotic drugs and sentencing him to a term of not less than ten years nor more than fifteen years.

Narcotics Agent Mitchell Ware testified that during the mid-afternoon of July 25, 1962, one Benny Scott called him and requested a meeting because "he had something lined up." Ware further testified that he subsequently met Scott near the intersection of 42nd Place and South Park, Chicago, Illinois; that he searched the pockets, coat and pants, socks and hat of Scott, found him free of narcotics, but in possession of about three-quarters of a dollar in change; that he gave Scott one hundred twenty-five ($125) dollars in currency after first recording the serial numbers of the bills; that Scott left him and commenced walking to Spiro's poolroom, located at 331 East 43rd Street; that he followed Scott in his automobile; that as Scott arrived at the poolroom he parked his automobile at the northeast corner of the intersection of 43rd Street and Prairie Avenue, just west of the poolroom; that he observed Scott meet defendant outside the poolroom; that he then observed Scott and defendant walk on the south side of the street toward the intersection where he was stationed; that when they reached the corner, he saw Scott hand an object to defendant, who thereupon went into the drugstore at the corner; that defendant returned about two minutes later and handed something to Scott; that while defendant was in the drugstore, he moved his car south of 43rd Street on the west side of Prairie Avenue across from the drugstore facing south; that upon

defendant's exit from the drugstore, he saw defendant join Scott outside; that they walked south on Prairie, Scott handing defendant a "wad of money"; that they continued to walk south to a building at 4351 South Prairie; that Scott sat down on the stairs and defendant began to walk back north to 43rd Street; that he approached Scott, searched him and found no narcotics or money other than the original change; that while Scott remained on the stair, he took up a surveillance position and waited for about one hour; that he left his position and returned to the drugstore at 43rd and Prairie to use the telephone to call his office; that when he returned from the drugstore, he saw defendant leaving the entrance of the building at 4351 South Prairie; that Scott exited about thirty seconds later; that he met Scott at the corner of 44th Street and Prairie where he was handed a white folded piece of paper containing a white powder; that a search of Scott revealed he was not in possession of any of the marked money nor narcotics; and that a positive reaction was obtained when a field test was conducted upon the white powder. Ware identified the piece of paper received from Scott as People's Exhibit No. 3, and the white powder contained within the paper as People's Exhibit No. 4. Subsequently, it was stipulated that the white powder was heroin. Ware concluded his testimony by stating that he arrested defendant three days later on July 28, 1962, in front of the same poolroom, at which time no part of the recorded one hundred twenty-five ($125) dollars was found.

Benny Scott testified that on July 25, 1962, at about 2:00 P.M., he engaged defendant in a conversation about the purchase of narcotics inside Spiro's poolroom and that after defendant said he would sell him narcotics for one hundred twenty-five ($125) dollars, he told defendant he would have to secure the funds from his mother; that he called Officer Ware and subsequently met him in his automobile at 42nd Place and South Park where Ware searched him, found him free of narcotics and all

currency except some change; that Ware gave him one hundred and twenty-five ($125) dollars of marked money; that he then went to Spiro's pool-room where he met defendant, telling him he was "ready to take care of the business," to which defendant responded "come on, I have to make a telephone call"; that defendant asked for a dime and he gave him a quarter as they walked toward Prairie, where at the corner of 43rd and Prairie, defendant entered the drugstore to use the phone; that upon returning from the drugstore, defendant gave him the change from the quarter and both began walking on Prairie toward 44th Street; that about three or four doors on Prairie from the drugstore, pursuant to defendant's request for the money, he gave defendant the one hundred twenty-five ($125) dollars given him by Ware.

Scott further testified that they continued to walk south to a building at 4351 South Prairie, about fifteen feet from the corner, where defendant told him to wait for about one hour and then left; that he rejoined Ware in his automobile which was facing south on the east side of Prairie Avenue and south of 44th Street, where Ware re-searched him and found no money other than change; that they returned to the building to ascertain if there was a phone there and after finding one, Ware returned to his automobile and he returned to sit on the doorstep of the building; that he had an acquaintance who resided on the third floor of this building but he had never been in his apartment nor in the building before and while sitting there his friend's wife met him on the way to the store and told him her husband was not home; that about three minutes after resuming his wait, Ware passed by going south on Prairie; that after waiting about an hour, he called Captain Healy, Ware's commanding officer; that while holding the phone in the hallway of the building, defendant returned, entered the building and gave him a folded piece of paper later identified as People's Exhibit No. 3; and that after placing the phone on its receiver, he left the building, met Ware and gave him

the folded piece of paper received from defendant.

Defendant, Fletcher West, testified on his own behalf. He denied that a transfer of dope took place between Bennie Scott and himself on July 25, 1962. He admitted, however, on cross-examination, a conversation which he had with Scott in or near the poolroom, in which Scott asked defendant if he could get some dope for him. Defendant answered, "No" and when pressed as to whether he could get it the next day, he said, "I told him wasn't no need coming back next day too" and "I told him to come back next week." He further testified he was not arrested until August 1, 1962.

On rebuttal and for the purposes of affecting the credibility of defendant's testimony, People's Exhibit No. 5, a certified and exemplified copy of a conviction of defendant for the unlawful sale of drugs from the United States District Court, Northern District of Illinois, and People's Exhibit No. 6, a certified and exemplified copy of a conviction of defendant for the offense of robbery, were admitted into evidence.

After hearing arguments, the trial court entered a finding and judgment of guilty and sentenced defendant to the Illinois State Penitentiary for a minimum term of ten years and a maximum of fifteen years from which judgment defendant appeals.

Defendant's theory of the case is that the uncorroborated testimony of a dope addict and police informer, who was the only witness to the entire transaction, was insufficient to prove defendant guilty beyond a reasonable doubt.

It is the People's theory that close surveillance by a police officer of the activities of an addict-informer who is initially searched by the officer and found free of narcotics, who is given marked money by the officer, who is observed conversing with the defendant, who is observed passing money to the defendant, and who leaves the defendant's

presence with a quantity of narcotics, clearly establishes the credibility of the informer and corroborates the informer's statement that the defendant was the person who sold him narcotics. The People conclude that this evidence sufficiently establishes guilt beyond a reasonable doubt.

In support of his position defendant cites the case of People v. Bazemore, 25 Ill.2d 74, 182 N.E.2d 649 (1962), where the court stated at page 77:

> This is not a case where the informer's accusation receives corroboration from close police surveillance of the transaction, from an immediate arrest, or from the finding of marked money on the accused, but one which developed in such a way that the informer was at liberty to name about any person he wishes to select as the guilty one.

Thus, defendant argues that the courts require corroboration of an informer's testimony, said corroboration being found by, one, the testimony of police officers, who observe the entire transaction under strict surveillance and can substantiate the informer's testimony; two, by the use of marked money which is given to the informer and later found on the defendant; and three, by an immediate arrest of the defendant at the scene of the transaction. Defendant further argues that in the instant case there was evidence submitted that Ware left his surveillance post for an undetermined time returning only to see defendant leaving the building in question; that Ware testified that he had partners who were also observing the transaction, yet none of them was ever asked to supplement Ware's testimony for the time period when he was absent from the scene. Defendant concludes that because of Ware's absence, the State had only the testimony of Scott to establish that defendant was the only person in the building when the alleged transfer of narcotics took place and that another person could have given Scott the narcotics. Defendant also points out that the other requirements in Bazemore were not fulfilled in the instant case in that defendant was not arrested until two

to three days after the surveillance and that the marked money was never recovered.

We disagree with defendant's contention. Ever since the pronouncement in People v. Crump, 5 Ill.2d 251, 256-262, 125 N.E.2d 615 (1955), that the capacity of narcotic users to observe, retain, recall and relate their experiences, factors which go to their credibility, may be affected by the use of narcotics, the courts have "developed various safeguards which will bolster and corroborate such testimony." People v. Frank, 51 Ill. App.2d 251, 256, 201 N.E.2d 197 (1964).

Initially, the chief safeguard considered by the courts was whether the officers assisting in the controlled purchase were in a position to observe the activities of the informer. People v. Villalobos, 20 Ill.2d 315, 318, 169 N.E.2d 745 (1960). This factor of police observation, or surveillance, was said to corroborate and make more credible the informer's testimony. In People v. Bazemore, 25 Ill.2d 74, 182 N.E.2d 649 (1962), the court said at page 77:

> A further circumstance in this case, which goes to the credibility of the witness, is the fact that the informer was not kept under surveillance by the police as he went about making the controlled purchase of drugs.

Another device to safeguard the infirmities attached to an addict-informer's testimony has also been recognized. This new safeguard only requires that the testimony be "credible under the surrounding circumstance." People v. Norman, 28 Ill.2d 77, 82, 190 N.E.2d 77, 82 (1963); People v. Drumwright, 48 Ill. App.2d 392, 396, 199 N.E.2d 282 (1964); People v. Romero, 54 Ill. App.2d 184, 188, 203 N.E.2d 635 (1964); People v. Walker, 50 Ill. App.2d 394, 186 N.E.2d 330 (1964).

There is no merit to defendant's argument that Officer Ware was not observing Scott at the time of the transfer of the narcotics. In People v. Frank, 51 Ill. App.2d 251, 201 N.E.2d 197 (1964), the court said at page 259:

> To hold, as the appellant demands that the police must observe the passage of the narcotics or the marked money and make a simultaneous arrest is to hold the police to an impossible burden and to destroy the 'controlled buy' as a weapon of law enforcement.

The case at bar is more in accord with the facts in the case of People v. Perkins, 26 Ill.2d 230, 186 N.E.2d 330 (1962), where the court sustained a conviction for the unlawful sale of narcotics saying, at page 235:

> ...though less valuable, corroboration exists in the fact that the officers did follow the defendant and the informer from the defendant's residence to the place where the narcotics were secured.

The court found corroboration in Perkins, by the surveillance from the place where the informer was searched to the place where the narcotics were obtained. The same corroboration is found in the case at bar by the surveillance from the poolroom to 4351 Prairie. This is sufficient surveillance to sustain the conviction.

Furthermore, we must also consider verification of the informer's testimony by a totality of the surrounding circumstances. This includes defendant's acknowledgment that he met Scott and conversed about the sale of narcotics; defendant's acquiescence in this unlawful endeavor by saying, "See me next week"; his admission of taking ten or fifteen dollars from Scott immediately after the discussion about a possible sale; his denial that he walked Scott to 4351 South Prairie when both Scott and Officer Ware testified differently; his concurrence in rejoining Scott in the hallway as Scott was on the phone; and the fact that Ware had Scott in his vision between the time the "wad of money" was passed and the second search of Scott at which time Scott had no currency. Together, these circumstances like those in People v. Drumwright, supra, where the court sustained the conviction, are "strong and credible."

In the instant case, the court after listening to defense counsel's closing argument, said:

> I would be inclined to agree with you if it was just the testimony of Benny Scott against your client ...But the interesting thing to me is Benny Scott's testimony is verified, as I said earlier, in many points in detail by Officer Ware. Money, searching, time element as to meeting West, where he went with West to the drugstore. Strangely enough, a larger part of this is also confirmed by your client.

This means that the trial court, aware of the infirmity of an addict-informer, found verification of Scott's version of the sale from both the surveillance of Officer Ware and the totality of the transaction's surrounding circumstances. For the above reasons the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.